

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Victor Quintana

Serial No. 77916753

Luke Brean of Breanlaw LLC for Victor Quintana.

Elissa Garber Kon, Trademark Examining Attorney, Law Office
106 (Mary I. Sparrow, Managing Attorney).

Before Seeherman, Holtzman and Masiello, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Victor Quintana, an individual, has appealed from the final refusal of the trademark examining attorney to register EQUILIBRIO WELLNESS and design, as shown below, for "physical fitness training services; providing fitness and exercise studio services, namely, pilates instruction and training" in Class 41, and "food nutrition

consultation; health care services, namely, wellness programs" in Class 44.¹



The application includes the following statements:

Color is not claimed as a feature of the mark. The mark consists of a circle containing a stylized depiction of the Mayan God Hunab Ku, with a swirling design and four rays emanating from the center to the sides and top, with the upper left half of the circle shaded. Around the circle are the words "EQUILIBRIO" over the top and "WELLNESS" around the bottom separated by two dots to the right and left of the circle.

The English translation of "Equilibrio" in the mark is Balance.

No claim is made to the exclusive right to use "WELLNESS" apart from the mark as shown.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark EQUILIBRIO, registered in standard characters, for the following

¹ Application Serial No. 77916753, filed January 21, 2010, asserting first use on December 1, 2008 and first use in commerce on February 12, 2009.

services in Classes 41, 44 and 45 that, as used in connection with applicant's services, it is likely to cause confusion or mistake or is likely to deceive.²

Class 41: providing information, counseling and consulting services in the field of exercise, and physical fitness via a global computer network, mobile phones, and wireless handheld computers.

Class 44: Providing information, counseling and consulting services in the fields of health, wellness, diet, nutrition, stress management, sleep management, medication, and vital sign monitoring via a global computer network, mobile phones, and wireless handheld computers.

Class 45: Personal lifestyle consulting services; providing information, counseling and consulting services in the field of personal lifestyle management via a global computer network, mobile phones, and wireless handheld computers.

We affirm the refusal of registration for both classes of applicant's application.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two

² Registration No. 3836247, issued August 17, 2010. The registration includes the statement, "The English translation of the word 'EQUILIBRIO' in the mark is balance."

key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the du Pont factor of "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." 177 USPQ at 567. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, both marks include the term EQUILIBRIO which, according to the translations in the application and registration, means "balance," and which, on this record, appears to be arbitrary. Although applicant's mark also contains additional elements, we find that they are not sufficient to distinguish the marks. With respect to the design

element, although it is a prominent visual element, there is no evidence that consumers would understand the symbol as a stylized depiction of the Mayan God Hunab Ku, such that this would be understood as the connotation or commercial impression of the mark. On the contrary, applicant's specimens show that it is the words EQUILIBRIO WELLNESS per se that are emphasized in headings in the text. Further, the examining attorney has submitted evidence from the YELP website, www.yelp.com, consisting of reviews of applicant's services, in which the services are identified as being offered under just the words "Equilibrio Wellness." In view of the foregoing, it is appropriate to accord greater weight to the word portion of applicant's mark. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services).

As for the word WELLNESS, it is descriptive of applicant's wellness program services, as applicant has acknowledged by his disclaimer of this word in response to the examining attorney's requirement. Therefore, it has little or no source-identifying significance. Applicant has argued that this word adds phonetic and conceptual

differences to applicant's mark, but we disagree. Although it clearly is an additional word, it does not affect the pronunciation of the word EQUILIBRIO, nor does it change the meaning of EQUILIBRIO. Cf. *Lever Bros. Co. v. Barcolene Co.*, 463 F.2d 1107, 174 USPQ 392 (CCPA 1972), in which the addition of CLEAR to ALL resulted in marks (ALL and ALL CLEAR) having different meanings.

Accordingly, having considered the marks in their entirety, but giving greater weight to the arbitrary term EQUILIBRIO in applicant's mark, which term constitutes the entirety of the cited mark, we find that the marks are similar, and that this du Pont factor favors a finding of likelihood of confusion.

This brings us to the du Pont factor of the "similarity or dissimilarity and nature of the goods or services as described in an application or registration..." 177 USPQ2d at 567. With respect to applicant's services as identified in Class 41 the examining attorney has submitted evidence of third-party registrations showing that third parties have adopted a single mark for physical fitness training services and for the providing of information, counseling and consulting services in the field of exercise and physical fitness online (the services identified in the cited registration). See for example, Registration No.

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4102946 for, inter alia, personal fitness training services and consultancy, providing fitness studio services, namely, providing exercise classes, providing a web site featuring information on exercise and fitness, and providing an on-line computer database featuring information regarding exercise and fitness; Registration No. 4046563 for, inter alia, consulting services in the fields of fitness and exercise, personal fitness training services and consultancy, and providing a website featuring information on exercise and fitness; Registration No. 4092156 for, inter alia, consulting services in the fields of physical fitness and exercise, personal fitness training services and consultancy, and providing a web site featuring information on fitness and exercise; and Registration No. 4102052 for, inter alia, consulting services in the fields of fitness and exercise, personal fitness training services and consultancy, and providing an interactive website featuring information and links relating to fitness.

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). In addition, although applicant has argued that his

services and those identified in the cited registration are different because his services are rendered in-person while the registrant's are rendered online and through mobile phones and wireless hand-held computers, applicant has acknowledged that such services may emanate from a single source: "While some gyms and similar service business may provide web applications to assist in tracking performance over time..." Response filed August 22, 2012, p. 7 of attachment.

As for the "food nutrition consultation" and "health care services, namely, wellness programs" identified in Class 44 of applicant's application, these would encompass the "providing ... consulting services in the fields of ... wellness, diet, nutrition ... via a global computer network, mobile phones and wireless handheld computers" identified in the cited registration.

Applicant argues that his services and those of the registrant are non-competitive and non-related because consumers would be well aware of the difference between information provided through the Internet, and in-person consultation: "consumers are well aware of the difference and are unlikely to view the two services as related in any meaningful way." Brief, unnumbered p. 4. Applicant also asserts that the examining attorney "has failed to

establish that consumers searching for physical fitness training services, food and nutrition services, and pilates instruction, are likely to view services provided by an in-person trainer and consultant to be equivalent to an online-only service provided via a global computer network, mobile phones, and wireless handheld computers." Id.

First, applicant's services are broadly described such that they could be rendered online, and not solely in-person. Second, and more importantly, the issue is not whether consumers could tell the differences in the services, or would view them as being equivalent or competitive. As often stated, it is not necessary that the goods or services be identical or even competitive in nature in order to support a finding of likelihood of confusion, it being sufficient that the goods or services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks employed thereon, to the mistaken belief that they originate from or are in some way associated with the same producer. In re Home Builders Association of Greenville, 18 USPQ2d 1313, 1317 (TTAB 1990).

We find that this du Pont factor favors a finding of likelihood of confusion.

The examining attorney has pointed out that neither applicant's identification of services, nor those in the cited registration, contain any limitation on channels of trade. The services as identified are of a type that would be offered to and obtained by the general public. Thus, the du Pont factor of the channels of trade would also favor a finding of likelihood of confusion.

Neither the examining attorney nor applicant has submitted evidence or argument on any other du Pont factors. To the extent that any are relevant, we treat them as neutral.

In view of the foregoing discussion, we find that applicant's use of his mark for his identified services is likely to cause confusion with the mark in Registration No. 3836247.

Decision: The refusal of registration is affirmed.